Supreme C
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No. 031595 MAY 2
OFFICE

IN THE
Supreme Court of the United States

EMPLOYERS INSURANCE OF WAUSAU
A MUTUAL COMPANY,

Petitioner,

v.

EL BANCO DE SEGUROS DEL ESTADO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a court, in the name of "interpretation" or "clarification," alter the substance of an arbitration award after that award has been judicially confirmed and enforced?

2. Does the *res judicata* doctrine prevent a party from contesting its obligations under a judicially-confirmed arbitration award when that party has already litigated those obligations to final judgment in a separate action?

RULE 29. 6 STATEMENT

All of petitioner's stock is owned by Employers Insurance of Wausau Mutual Holding Company which, in turn, is wholly owned by Liberty Mutual Holding Company, Inc.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. at 1a-9a) is reported at 357 F.3d 666 (7th Cir. 2004). The opinion of the district court (App. at 11a-16a) is unreported.[1] The court of appeals' earlier opinion in this case (App. at 43a-61a) is reported at 199 F.3d 937 (7th Cir. 1999). The district court's initial opinion (App. at 62a-78a) is unreported.

JURISDICTION

The court of appeals entered judgment on February 3, 2004. A timely petition for rehearing was denied on February 25, 2004 (App. at 10a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant parts of the Federal Arbitration Act, 9 U.S.C. §§ 9, 10, 11 and 12, are reproduced at pp. 79a-81a of the Appendix.

STATEMENT OF THE CASE

This case presents important questions regarding the authority of courts to review, and then alter, arbitration awards once those awards have already been judicially confirmed and enforced. The court below, under the auspices of "interpretation," changed the substance of an arbitration award eight years after it had been issued, five

[1] The district court issued several subsequent amendments to that opinion, which are reproduced at App. 17a-22a.

years after it had been confirmed, and two years after it had been enforced. In effect, that "interpretation" rewrote the award and one of its remedies, eliminating a letter of credit obligation required not only by the confirmed award itself, but also by a final judgment in a related, yet independent action.

Neither the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, nor this Court's relevant arbitration decisions contemplate late-stage, post-confirmation judicial interference with arbitration awards. The precedent established by the court below offers support and encouragement to those who would turn arbitration away from its intended purpose and into a prelude to never-ending litigation. Moreover, the court's decision exacerbated a pre-existing circuit split regarding the appropriate method for resolving ambiguities in an arbitration award both *prior* to judicial confirmation and *after* an award has already been confirmed.

Although this Court has staked out a very limited role for the judiciary in reviewing arbitration awards, it has not yet established when, if at all, courts may "interpret" or "clarify" arbitration awards themselves, and when they must leave that work to arbitrators. Nor has this Court determined whether, once an arbitration award has been confirmed, there is any further room for "interpretation" or "clarification" of that award.

Accordingly, further review is necessary to specify more precisely the circumstances under which courts, through "interpretation" or "clarification," may modify arbitration awards after they have already been judicially confirmed and enforced. Given the increasingly critical role

of arbitration as a method of dispute resolution, Supreme Court guidance on this issue is essential.[2]

A. Supreme Court Precedent Concerning Judicial Review Of Arbitration Awards.

Judicial scrutiny of arbitration awards is extremely narrow. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 41 n.4 (1991); *see also Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). Courts are not permitted to analyze the merits of arbitrators' decisions, or to substitute their own judgment for that of the arbitrators. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987); *Enterprise Wheel*, 363 U.S. at 596. Similarly, courts should not entertain claims of factual or legal error by an arbitrator as an appellate court might in reviewing a lower court decision. *See Misco*, 484 U.S. at 38. Likewise, courts

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[2] "One of the foremost trends in corporate America in recent years has been the shift from traditional litigation and agency resolution of disputes toward the use of alternative dispute resolution (ADR)." David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. Pa. J. Lab & Emp. L. 133, 134 (Spring 1998). In a late 1990s study of over 600 Fortune-1000 companies, eighty percent reported using arbitration as a method of dispute resolution at least once in the past three years. *Id.* at 137. The use of arbitration has only increased in the intervening years. In an article in the *Boston Business Journal*, a senior vice president of the American Arbitration Association stated: "If I had to guess, I would say that arbitration has been written into literally millions and millions of contracts." Linda Goodspeed, *Litigation's Rising Price Tag Boosts Arbitration's Appeal*, Boston Business Journal, October 4, 2002, *at* http://boston.bizjournals.com/boston/stories/2002/10/07/focus3.html. Furthermore, the number of cases filed with the American Arbitration Association has increased from 60,808 in 1990 to 218,032 in 2001. *Id.*

have no authority to disagree with the remedy or relief chosen by arbitrators. *Id.*

Limited judicial review serves an important goal of the FAA. It fosters and respects arbitration agreements, in which parties have agreed that arbitration, not judicial resolution, will be the method for resolving their disputes. As this Court has explained:

> . . . a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligations under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances.

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995).

Indeed, this Court's arbitration decisions aim to give effect to the parties' contractual agreement to arbitrate. *See Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402, 2408 (2003); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995), *citing Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)("the central purpose of the Federal Arbitration Act [is] to ensure 'that private agreements to arbitrate are enforced according to their terms.'"); *Misco*, 484 U.S. at 36-37. Courts should not interject themselves into this private dispute resolution process by reviewing the merits of an arbitration award. *Kaplan*, 514 U.S. at 948; *Garvey*, 532 U.S. at 509.

B. The Federal Arbitration Act's Limits On Judicial Review Of Arbitration Awards.

Like this Court, Congress has recognized that arbitration awards are not to be second-guessed by the judiciary. The FAA anticipates that courts will confirm arbitration awards, turning final arbitration awards into judgments of the court. Nonetheless, the FAA allows courts to vacate, modify or correct awards under certain limited circumstances. 9 U.S.C. §§ 9-11 (App. at 79a-81a). For example, a court may vacate an award procured by corruption or fraud, or may modify or correct an award that contains an evident material mistake. *Id.* Consistent with this limited scope of judicial review, the FAA gives parties only three months after an award is issued to ask a court to vacate, modify or correct it. 9 U.S.C. § 12 (App. at 81a).

These congressional restrictions on judicial oversight of arbitration awards dovetail with another purpose of arbitration: to permit the swift and inexpensive resolution of contractual disputes by avoiding the expense and delay of litigation. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-123 (2001); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)("[b]y agreeing to arbitrate . . . [a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."). Limited judicial review of awards promotes prompt disposition by discouraging automatic appeal; it thereby honors the contractual dispute resolution mechanism for which the parties have bargained. *See Misco*, 484 U.S. at 36-37; *Enterprise Wheel*, 363 U.S. at 599 ("[i]t is the arbitrator's construction which was bargained for; . . . the courts have no business overruling him because their interpretation of the contract is different from his."); *see generally Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985)

(FAA's basic purpose is to "ensure judicial enforcement of privately made agreements to arbitrate").

C. The Circuit Split.

When an arbitration award does not contain an evident material mistake, but is nonetheless ambiguous, the circuit courts generally agree that, at least prior to judicial confirmation, the award should be remanded to the arbitrators for clarification; judges should not try to resolve the ambiguity.[3] "[R]emand for clarification . . . is consistent

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[3] *Fradella v. Petricca*, 183 F.3d 17, 20 (1st Cir. 1999) (a district court can "remand an ambiguous arbitral award for clarification"); *Hyle v. Doctor's Assocs., Inc.*, 198 F.3d 368, 371 (2d Cir. 1999) (when there is an ambiguity in an arbitration award, the district court should remand to the arbitrator to clarify the award); *Colonial Penn Ins. Co. v. The Omaha Indemnity Co.*, 943 F.2d 327, 334 (3d Cir. 1991) ("courts have uniformly stated that a remand to the arbitration panel is appropriate in cases where the award is ambiguous"); *Cannelton Indus., Inc. v. District 17, United Mine Workers of America*, 951 F.2d 591, 594 (4th Cir. 1991) (when an award is ambiguous, "the court may remand the case to the arbitrator for clarification."); *Brown v. Witco Corp.*, 340 F.3d 209, 216 (5th Cir. 2003) (a "court may not interpret the award in order to resolve the ambiguity and implement the award; instead, the court must remand the award to the arbitrator with instructions to clarify the award's particular ambiguities."); *Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers, Local No. 24*, 357 F.3d 546, 553 (6th Cir. 2004) ("if an arbitration award is ambiguous and in need of clarification, courts are made to remand back to the arbitrator to clarify its meaning and intent."); *Domino Group, Inc. v. Charlie Parker Memorial Foundation*, 985 F.2d 417 (8th Cir. 1993) (district court properly remanded case to arbitrator for clarification of an ambiguous arbitration award); *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 n.1 (9th Cir. 1982) ("[r]emand to an arbitrator for clarification and interpretation is not unusual in judicial enforcement proceedings."); *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 780 n.4 (11th Cir. 1993) ("A remand for clarification is proper only when the award itself can be interpreted in a variety of ways."); *Sargent v. Paine Webber Jackson & Curtis, Inc.*, 882 F.2d 529, 533 (D.C. Cir. 1989) (recognizing remand to the arbitrator for clarification of an award's meaning).

with the policy of judicial restraint that is the thrust of federal arbitral jurisprudence because it gives the arbitrator the opportunity to clarify an award with respect to which an ambiguity has arisen rather than forcing the court to interpolate its own estimate of the arbitrator's intent." *Official & Prof'l Employees Int'l Union, Local No. 471 v. Brownsville Gen. Hosp.*, 186 F.3d 326, 332 (3d Cir. 1999).

Despite agreeing with this basic proposition, the Seventh Circuit considers remand for clarification to be a "disfavored procedure." *Tri-State Bus. Machs., Inc. v. Lanier Worldwide, Inc.*, 221 F.3d 1015, 1017 (7th Cir. 2000)(citations omitted). Moreover, the Seventh Circuit, unlike any other circuit, allows district courts to "interpret and enforce an ambiguous award if the ambiguity can be resolved from the record." *Id.* (citation omitted); *see also Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 279 (7th Cir. 1992); *Teamsters Local No. 579 v. B&M Transit, Inc.*, 882 F.2d 274, 278 (7th Cir. 1989); *Ethyl Corp. v. USW*, 768 F.2d 180, 188 (7th Cir. 1985).

The Seventh Circuit's rule, allowing courts to interpret ambiguous arbitration awards when the ambiguity can supposedly be resolved from the record, was inconsistent with the majority rule even before this case. That court's willingness to venture into "interpretation" of arbitration awards has brought it far closer to reviewing the merits of arbitral decisions than any other circuit court. With the decision below, however, the Seventh Circuit has set itself even further apart from the majority by holding that courts, including appellate courts, may interpret and clarify arbitration awards *after* the award has already been confirmed and enforced. The only other circuit to address "clarification" in a post-confirmation setting found that clarification should be performed by the arbitrators, not by the court. *See M&C Corp. v. Erwin Behr GmbH & Co.*, 326 F.3d 772 (6th Cir. 2003).

The Seventh Circuit's approach is improper, especially in a post-confirmation context. It allows far too much judicial interference with arbitration awards and, thus, with the dispute resolution method chosen by parties who have specifically agreed to arbitrate. It also creates too great a possibility that a court will substitute its judgment for that of the arbitrators. And, it places no limit on when a court may clarify an award, allowing that to happen years after confirmation and enforcement has taken place. The goal of finality, embodied in both the FAA and the *res judicata* doctrine, is cast aside. The Seventh Circuit's approach, in short, conflicts with the rules of the other circuits, the FAA and this Court's general jurisprudence. Accordingly, further review is necessary.

D. Background.

Between 1966 and 1973, petitioner Employers Insurance of Wausau A Mutual Company ("Wausau") entered into a series of excess retrocessional reinsurance "treaties" or "contracts" with more than 100 reinsurance underwriters. Respondent El Banco de Seguros del Estado ("Banco"), the state insurance bank of Uruguay, was one of those underwriters. The contracts obligated the underwriters or "retrocessionaires," including Banco, to reinsure Wausau for a specified percentage of direct reinsurance losses paid by Wausau. Each of the contracts included an agreement to arbitrate disputes.

A dispute arose and, in 1991, Wausau demanded arbitration. After four years of preliminary litigation, the arbitration commenced in the summer of 1995. In September 1995, Wausau obtained an arbitration award against Banco and a number of other reinsurers. (App. at 82a-84a). All of the reinsurers, except Banco, paid their respective shares of the approximately $7.8 million award

within 45 days, and were thereby released from further liability under the reinsurance contracts. Having failed to pay its $181,000 share within 45 days, however, Banco became subject to additional components of the arbitration award:

> If such amounts are not tendered by [the retrocessionaires], either individually or collectively, within 45 days of the date of this award, the Panel makes the following additional awards:
>
> 1) Interest from the date of this award at a compound annual rate of 7.5%;
>
> 2) Attorneys fees and costs of $930,730 for which [the retrocessionaires] are jointly and severally liable;
>
> 3) At the expiration of a period of 45 days following the date of this award, [the retrocessionaires] shall provide a Letter of Credit to Employers of Wausau in the amount of $9,000,000 in a form acceptable to the Wisconsin Insurance Department and to secure payment of the ultimate liability in this matter.

(App. at 84a).

In July 1998, after it had become obvious that Banco would not abide by the award, Wausau filed a petition to confirm that award in the United States District Court for the Western District of Wisconsin. That court entered a judgment confirming the award in January 1999 ("the January 1999 judgment"), rejecting Banco's arguments that it had not been given proper notice of the arbitration. (App.

at 62a-78a). The United States Court of Appeals for the Seventh Circuit affirmed in December 1999. *Employers Insurance v. Banco de Seguros del Estado*, 199 F.3d 937 (7th Cir. 1999) (App. at 43a-61). This Court denied Banco's petition for certiorari in June 2000. *See* 530 U.S. 1215 (2000). Banco never asserted, during any of these proceedings, that the arbitration award was ambiguous or in need of clarification.

Despite having lost at all stages of the judicial process, Banco refused to obey the judgment confirming the award: it did not pay the $181,000; it did not pay the applicable interest; it did not pay the applicable attorneys' fees; and it did not post the required letter of credit. Instead of complying, in June 2001, after Wausau had begun efforts to enforce the January 1999 judgment, Banco filed an action in the United States District Court for the Southern District of New York in an effort to obtain "clarification" of the arbitration award and the January 1999 judgment confirming it. (App. at 85a-94a). The New York federal court transferred the action to the Western District of Wisconsin, where Banco then raised the same arguments regarding the award and the January 1999 judgment that it later raised in this action. The Western District of Wisconsin rejected those arguments, dismissed the case and imposed sanctions on Banco for filing frivolous litigation. (App. at 25a-34a). Banco never appealed.

In August 2001, Wausau filed a motion with the Western District of Wisconsin asking for assistance in enforcing the January 1999 judgment and for sanctions against Banco for contempt of court. In September 2001, the district court granted Wausau's motion, instructed Banco to comply with its obligations under the arbitration award and judgment, and gave Banco "until September 30, 2001 to issue a $9 million letter of credit and pay all money due under the arbitration award and this order." (App. at 35a-

42a). Again, the district court rejected Banco's arguments regarding the requirements of the arbitration award and the January 1999 judgment confirming it.

Banco appealed the district court's September 2001 order. In March 2002, Banco finally took initial steps to comply with the district court's January 1999 judgment by paying Wausau approximately $1.5 million (comprising Banco's share of the original arbitration award, interest and attorneys' fees). That payment, however, came months after the September 30, 2001 deadline set by the district court, and only fulfilled part of Banco's obligations under the judgment. Banco still refused to post the $9 million letter of credit that both the judgment and the award required.[4]

In February 2003, the Seventh Circuit dismissed Banco's appeal in its entirety, sending the case back to the district court. (App. at 23a-24a). Shortly thereafter, in March 2003, Banco sent Wausau an arbitration demand, purporting to commence a new arbitration. In its demand, Banco asserted that its $1.5 million payment to Wausau satisfied its "ultimate liability" and that a new arbitration was needed because it no longer had to open any letter of credit. Noting that the district court had seen and decided that argument before, Wausau asked the district court to enjoin Banco from proceeding with a new arbitration. Wausau also asked the court to impose sanctions against Banco for its continued refusal to fully comply with the arbitration award and judgment confirming it. The district court granted Wausau's requested relief in April 2003. (App. at 11a-16a).

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[4] Banco's failure to post that letter of credit was also in violation of the Western District of Wisconsin's decision and judgment in the transferred New York action, which had also recognized the award's requirement that Banco post the $9 million letter of credit. (App. at 25a-34a).

Banco appealed, bringing the case before the Seventh Circuit for the third time.

E. The Decision Below.

On February 3, 2004, the Seventh Circuit upheld the district court's sanctions against Banco (App. at 1a-9a), finding that Banco's "impressive record of obstinacy" and its "seemingly irrational obduracy" were unacceptable. *See* App. at 5a, 8a. Despite upholding the sanctions, however, the court determined that Banco no longer had to post the $9 million letter of credit that the arbitrators had awarded Wausau as relief.

The Seventh Circuit opened its decision with a history of Banco's long-standing refusal to comply with the arbitration award and the district court's January 1999 judgment. The court pointed out that even after the district court had issued a writ of execution and Banco had finally acknowledged "that it owed Wausau $181,000, plus interest and attorney fees, Banco neither paid anything nor posted a letter of credit in any amount or on any terms." *Id.* at 3a.

After recounting Banco's repeated decisions to ignore what the arbitrators and the courts had ordered, the Seventh Circuit noted that it was far too late for Banco to seek "clarification" of the eight-year old award directly from the arbitration panel. Banco simply had "no legal basis for so belated a demand for clarification" from the arbitrators. *Id.* at 5a. "[T]he time to have sought arbitral clarification was when the award was issued, not eight years later." *Id.* The court also rejected, as far too late, Banco's request that the court remand the award to the arbitration panel. *Id.* at 6a. Banco had a "reasonable time" to make such a request, but eight years was "not a reasonable time." *Id.*

The court recognized that Banco's conduct "showed [that] Banco would never comply with the order to post the letter of credit unless subjected to the strongest possible penalty for civil contempt." *Id.* at 5a. Accordingly, the court upheld the district court's sanctions award, including attorneys' fees. It also upheld the district court's injunction prohibiting Banco from rearbitrating the award's letter of credit requirement, calling that maneuver a "frivolous demand for arbitration . . . ." *Id.*

Still, after all this, the Seventh Circuit revisited the terms of the award and determined, as Banco had argued, that Banco did not have to post the $9 million letter of credit. The court did this despite the fact that the letter of credit requirement had been reviewed and confirmed by the lower courts, including the Seventh Circuit itself, years before. *See* 199 F.3d 937 (7th Cir. 1999) (App. at 43a-61a).

The Seventh Circuit found that there was now "a legitimate disagreement" between Wausau and Banco over how the letter of credit might be used once Banco posted it. *See* App. at 5a. In the court's view, Banco was "asking for clarification at this late date" of whether the $9 million letter of credit was "just meant to secure Banco's existing liability to Wausau, or whether as Wausau [claimed] it secured future debts as well." *Id.* at 8a. Remarkably, the court determined that Banco's view "is the *correct interpretation*." *Id.* (emphasis added).

The Seventh Circuit's decision runs directly counter to the well-established reluctance of courts to meddle in the merits of arbitration awards, either before or after confirmation. Despite finding that it was too late for the arbitrators to clarify the award, the court did not consider it too late for it to revisit the award, and offer its own interpretation of what the arbitrators meant by the letter of credit remedy they awarded.

F. Petition for Rehearing.

Wausau filed a timely petition for rehearing, challenging the decision in several respects. It pointed out that the court had overlooked the fact that Banco had made the same arguments about the letter of credit on appeal as it had before the district court in the transferred New York action years earlier. In both instances, Banco had asked the court to dispense with the $9 million letter of credit once the monetary sums under the arbitration award were paid. In that independent action, however, the district court rejected Banco's arguments and left in place the award's requirement (as confirmed by the January 1999 judgment) that Banco post the $9 million letter of credit. Banco never took an appeal from that order. Because all of the elements of the *res judicata* doctrine had been met, Wausau argued that Banco could not raise those arguments again.

Wausau also suggested that the Seventh Circuit may have misunderstood the letter of credit requirement, because the court had explained in its decision that the requirement "was to secure the debt created by the award, not future, unrelated debts." *Id.* at 8a. Wausau noted that the issue actually before the district court was not what the letter was to secure, but whether Banco had an obligation to *post* the letter of credit. Wausau argued that there was no ambiguity about that. The separate issue of what obligations the letter of credit might be used to secure, once posted, was not addressed by the district court and, for that reason, Wausau argued that was not an issue properly before the court on appeal.

Yet, because the Seventh Circuit had chosen to consider and decide that issue, Wausau encouraged the court to be certain it understood that the arbitrators intended the letter of credit to secure the "ultimate liability." Wausau

explained that when the arbitrators awarded a letter of credit as security, they were considering all losses, past and future, that Wausau would be required to pay under the treaties. So, payment of Banco's share of the past losses contained in the award would not eliminate the need for security for future asbestos-related bodily injury losses for which Banco was liable under the treaties and award. Accordingly, Wausau asserted that those future losses, secured by the letter of credit, were "related" to the arbitration award in a very real sense.

In its various orders and judgments, the district court had enforced the award's letter of credit remedy as written, without delving into the question of how that letter of credit might be used once posted. For that reason, Wausau had developed no evidentiary record before the district court on what the letter of credit was meant to secure under the arbitration award. In its petition for rehearing, therefore, Wausau described what its arbitration record evidence would demonstrate. It asked the court for the opportunity to at least present that record to the district court so that the relevant evidence about the arbitration record could be considered. Wausau contended that if the Seventh Circuit were going to follow its rule allowing courts to "interpret" ambiguous awards based on "the record" of the arbitration, that record should at least be considered.

The court, without opinion, denied Wausau's petition for rehearing on February 25, 2004. (App. at 10a).

REASONS FOR GRANTING THE PETITION

The decision below expands a circuit conflict regarding the appropriate method for addressing ambiguous arbitration awards. All circuits considering the issue, other than the Seventh Circuit, require clarifications to be made by

the arbitrators that issued the award, not by courts later reviewing the award.

The Seventh Circuit, however, allows judicial clarification of an arbitration award both *prior* to judicial confirmation and enforcement and, as the decision below demonstrates, years *after* an award has already been confirmed and enforced. The Seventh Circuit's approach is decidedly contrary to this Court's jurisprudence on arbitration, out-of-step with the other circuits, and in contrast to the goals of the FAA. It gives far too little weight to the parties' contractual choice of arbitration as their dispute resolution remedy. It jeopardizes the finality that attaches to all confirmed arbitration awards once appellate review has been exhausted. And, it encourages those who disagree with the outcome of arbitration to turn to the courts for a new, more favorable decision-maker.

I. There Is A Need for Supreme Court Guidance On The Precise Timing And Circumstances Under Which An Arbitration Award May Be Judicially Clarified After That Award Has Already Been Confirmed And Enforced.

This Court has never addressed the appropriate standards for interpretation and clarification of arbitration awards. In a number of decisions, however, this Court has set out its general philosophy regarding arbitration. Those decisions emphasize the importance of judicial restraint when courts face challenges to, and attacks on, the merits of arbitral awards. Following that guidance, almost all federal circuit courts have determined that it is improper for the judiciary to meddle with arbitration awards by attempting to clarify those awards themselves. Instead, when an arbitration award is deemed ambiguous, nearly all the circuit courts, except the Seventh Circuit, require that award to be remanded to the arbitration panel for clarification.

The Seventh Circuit has adopted a different approach. Although it recognizes that district courts "generally may not interpret an ambiguous arbitration award" but should remand to the arbitrators for clarification, it "disfavors" remand and allows courts to "interpret and enforce an ambiguous award if the ambiguity can be resolved from the record." *See Flender Corp.*, 953 F.2d at 279-80; *see also Tri-State Bus. Machs.*, 221 F.3d at 1017. The Seventh Circuit's decision in the current case expands its ability to interpret ambiguous awards and presents future parties with a distinct, and entirely inappropriate, incentive to pursue continuing rounds of litigation in hopes of overturning or modifying an adverse arbitration award.

When courts attempt to resolve ambiguities, they place themselves in a role that belongs more appropriately to arbitrators. What arbitrators intended and what certain provisions in an award actually mean are for arbitrators to decide. Allowing courts to resolve ambiguities creates too great a risk that courts will substitute their own views for those of arbitrators. When that happens, parties who bargained for a non-judicial resolution of their disputes are deprived of the dispute resolution forum they specifically chose.

A. The Seventh Circuit's Approach Is At Odds With The Law Of The Other Circuits As Well As The Policies Underlying The Finality Of Arbitration Awards.

The circuit courts are virtually uniform in their views with respect to the resolution of ambiguous arbitration awards. *See supra* note 3. A court "may not interpret the award in order to resolve the ambiguity and implement the award." *Witco*, 340 F.3d at 216. Instead, the appropriate method for resolving an ambiguity -- embraced by the vast

majority of the circuit courts -- is to remand the award to the arbitrator with instructions to clarify the award's particular ambiguities. *See supra* note 3.

Judicial interpretation of an arbitration award usurps the parties' contractual agreement to have their disputes determined in an arbitral, as opposed to a judicial, forum. *See Bazzle*, 123 S. Ct. at 2407-2408; *Mastrobuono,* 514 U.S. at 53-54; *Misco*, 484 U.S. at 36-37. A remand "avoids the court's misinterpretation of the award and is therefore more likely to give the parties the award for which they bargained." *Colonial Penn*, 943 F.2d at 334; *see also Enterprise Wheel*, 363 U.S. at 599; *Brown v. Coleman Co.,* 220 F.3d 1180, 1183 (10th Cir. 2000) (the parties "contracted for the arbitrator's construction of the contract not a judge's construction.").

Despite the virtually unanimous view of the other federal circuit courts, the Seventh Circuit follows a different path. According to the Seventh Circuit, remand of an ambiguous arbitration award is a "disfavored procedure." *Flender Corp.*, 953 F.2d at 280. Remand should be avoided, the Seventh Circuit maintains, because of the "interest in prompt and final arbitration." *Ethyl Corp.*, 768 F.2d at 188.[5]

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[5] Other circuit courts, like the Seventh Circuit, recognize that the goal of achieving prompt arbitration decisions is consistent with the policy and purpose of the FAA. *See, e.g., Island Creek Coal Sales Co. v. Gainesville*, 764 F.2d 437, 441 (6th Cir. 1985) (to "require federal courts to remand for clarification or correction every arbitration award disputed by one of the parties" when brought to the court for enforcement "would make for an expensive and tedious process, directly opposite to the purpose of arbitration.") Still, the Seventh Circuit is the only court to stretch that principle to the degree it has in this case, allowing "interpretation" to clarify an award, without regard to the record developed before the arbitrators, even years after judicial confirmation of the award.

Thus, if an ambiguity in an award can be "resolved from the record," a court is free to interpret and enforce that award. *Flender Corp.*, 953 F.2d at 280; *Tri-State Bus. Machs.*, 221 F.3d at 1017.

Under Seventh Circuit jurisprudence, the arbitration "record" that courts can and should review in clarifying an award includes: the original grievance or complaint; the arguments and positions taken during the arbitration proceedings; all evidence and exhibits presented at the hearing; and the actual transcript of those arbitration proceedings, including any statements by the arbitrator. *Tri-State Bus. Machs.*, 221 F.3d 1015; *Flender Corp.*, 953 F.2d 273; *United Food & Commercial Workers Local 100A v. John Hofmeister & Son, Inc.*, 950 F.2d 1340 (7th Cir. 1991); *B&M Transit*, 882 F.2d 274; *Ethyl Corp.*, 768 F.2d 180. Basically, all documents and all testimony that were before the arbitrators become fair game for judicial review in resolving an ambiguity in an award.

A district court, under the Seventh Circuit's rule, takes on the attributes of an appellate court, reviewing the same materials and the same evidence that the arbitration panel examined. After conducting that review, the district court decides what the arbitrators intended or meant by their award.

The Seventh Circuit's rule puts the court perilously close to – if not into – the forbidden territory of reviewing the *merits* of an arbitration award. This is not how judicial review of arbitration awards is supposed to work. *See Misco*, 484 U.S. at 36 ("courts play only a limited role when asked to review" an award and "are not authorized to reconsider the merits of an award"); *Garvey*, 532 U.S. 509 (courts have "no business" reviewing the merits of an arbitration award).

While the Seventh Circuit may be correct that it is sometimes faster for courts to resolve ambiguities than it is for arbitrators, speed should not be the predominant consideration motivating the law on this subject. Indeed, this Court has previously recognized that "the basic objective in this area is not to resolve disputes in the quickest manner possible . . . but to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms' . . . and according to the intentions of the parties . . . ." *Kaplan*, 514 U.S. at 947 (citations omitted); *see also Dean Witter Reynolds*, 470 U.S. at 221 (the Court was "not persuaded . . . that the conflict between two goals of the Arbitration Act – enforcement of private agreements and encouragement of efficient and speedy dispute resolution – must be resolved in favor of the latter"). A rush to judgment results in the arbitrators who issued the award not being afforded the opportunity to explain what they meant all along. In short, judicial interpretation or clarification of ambiguous arbitration awards is generally inappropriate.

There is a reason that the FAA provides courts with only a narrow opportunity to "modify" or "correct" arbitration awards. 9 U.S.C. § 11. Congress recognized that courts should not be interfering in arbitral decision-making unless the arbitrators have made an evident miscalculation or mistake, or issued a decision on a matter not before them. *Id.; Diapulse Corp. of America v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980) ("judicial intervention into the arbitral process is precisely what the narrowly defined provisions of sections 10 and 11 [of the FAA] were designed to prevent."). In essence, Congress recognized that unless the arbitrators made an obvious blunder, courts should leave their decisions intact.

The Seventh Circuit's approach runs directly counter to the principles embodied in the FAA and in this Court's jurisprudence. Although the Seventh Circuit may consider

that courts are capable of deciding which ambiguities can be resolved by them and which should be resolved by the arbitrators, that is a troublesome choice to leave to the courts. Courts may very well think they know exactly what the arbitrators meant in an award when the arbitrators themselves had something entirely different in mind. Remand to the arbitrators for clarification poses a more prudent approach when a court faces an ambiguous award, and one that is more true to the goals of arbitration.

And when, as in this case, a court resolves a purported ambiguity *after* the award has already been judicially confirmed and enforced, the prospect of judicial interference with the award and resulting damage to the arbitration remedy is even greater. Because of its late-stage clarification, the decision at issue treats a judicially-confirmed award, which has become final through exhaustion of appellate remedies, as fair game for new challenge. This, in turn, creates incentives for parties to attack arbitration awards that have already been confirmed as final judgments, thereby turning arbitration into a mere prelude to additional rounds of litigation.

B. The Late-Stage Clarification Of The Award At Issue Presents An Appropriate Circumstance For This Court To Develop Rules Governing Clarification Of Awards.

Clarification of ambiguous arbitration awards typically occurs before the awards are judicially confirmed. Indeed, that is when clarification, if necessary, *should* occur. Courts should not confirm ambiguous awards, but rather should attempt to have any ambiguities resolved before confirmation. *See, e.g., Bell Aerospace Co. Div. of Textron, Inc. v. International Union, United Auto., etc.*, 500 F.2d 921, 923 (2d Cir. 1974) ("[c]ourts will not enforce an award that is incomplete, ambiguous, or contradictory."); *Witco*, 340

F.3d at 220 n.12 ("in an action to confirm or enforce an arbitration award, the court itself must determine whether the arbitration award is ambiguous and decide what must be clarified by the arbitrator on remand."). Accordingly, most federal circuits attempt to resolve any ambiguities – by a remand to the arbitrator – *before* confirming or enforcing an arbitration award.

Early resolution of ambiguities is consistent with the FAA's approach to correcting evident arbitral mistakes. A party that wants a court to correct a mistake in an arbitration award has only three months to request that correction. 9 U.S.C. § 12. According to the decision below, parties are not limited to that three-month timeframe for seeking clarification from arbitrators of an ambiguous award, and need only file their motion within a reasonable time. *See* 357 F.3d at 670 (App. at 6a).

The goal of early resolution of ambiguities is consistent with one of the overall goals of arbitration: to resolve disputes promptly and finally, with limited expense. As the Seventh Circuit recognized in this case, waiting eight years after an award is issued before seeking clarification of an alleged ambiguity is simply too long. *Id.* When that kind of delay occurs, the system and rules promoting prompt and final disposition are turned on their head.

Though it had the opportunity, Banco never asked that the award be clarified when the district court originally confirmed it, or later when the Seventh Circuit affirmed that confirmation. Nor did it ask for clarification when Wausau commenced enforcement, seeking a writ of execution. Nonetheless, after years of delay by Banco, the Seventh Circuit still went ahead and, at Banco's request, addressed an alleged ambiguity that Banco had finally found in the award. The court clarified that purported ambiguity five years after the award was confirmed and two years after it was enforced.

The situation faced by the Seventh Circuit in this case, involving a late-stage request for arbitral clarification, is not unique. The Seventh Circuit faced arguments regarding the meaning of a previously-confirmed award in *Tri-State Bus. Machs.*, 221 F.3d 1015, although the dispute there arose within three months after confirmation of the award as opposed to the years that passed here before clarification was sought.

As in the pre-confirmation context, the Seventh Circuit's approach to clarification of judicially-confirmed awards is distinctly different from other circuit courts, as well as in contrast to this Court's respect for the goals and purposes of arbitration. For example, in *M&C Corp v. Erwin Behr GmbH & Co.*, 326 F.3d 772 (6th Cir. 2003), the Sixth Circuit recognized that although the relevant arbitration award had already been confirmed and enforced, it still could potentially be remanded to the original arbitration panel for clarification of an ambiguity.[6] Thus, even in a post-confirmation context, the Sixth Circuit explained that "for a court to engage in guesswork as to the meaning and application of an ambiguous arbitration award is inconsistent not only with federal policy, but also with the parties' own agreement to submit their dispute to arbitration." *Id.* at 782.

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[6] In *M&C Corp.*, the question that the district court remanded to the original arbitrators for clarification concerned the calculation of commissions under a portion of an earlier confirmed award. Even though that earlier confirmed award had been partially performed by Behr, and the district court was in the process of determining "whether Behr had satisfied the judgment when it encountered an ambiguity in the award," the Sixth Circuit still was willing to permit remand to the arbitrators. 326 F.3d at 781. The court of appeals required the district court to identify precisely what the ambiguity was so that it could determine "whether the circumstances are appropriate for a remand to the arbitrator." *Id.* at 783.

M&C Corp. is significant because it is in direct contrast to the decision below regarding how post-confirmation requests for clarification should be treated. The Sixth Circuit's approach demonstrates judicial deference to the arbitrator's sole responsibility for resolving any ambiguity in an arbitration award, regardless of the lateness of the request. In contrast, when faced with a post-confirmation clarification request, the Seventh Circuit here chose to identify the issue for interpretation itself, without the assistance of the district court and without examination of the arbitration record -- and to resolve that issue as well. Its approach conflicts, not only with the Sixth Circuit's view, but also with the FAA and with judicial deference to the arbitral process. Moreover, it undermines all notions of finality inherent in any judicially-confirmed arbitration award.

The circumstances present here -- which directly illustrate the problems of late-stage judicial clarification of arbitral awards -- provide this Court with a sound backdrop to address issues that its current decisions have not yet resolved.

II. The Decision Below Is Incorrect.

With its decision in this case, the Seventh Circuit extended its approach to ambiguous arbitration awards well beyond any acceptable stopping point. While there is little reason for courts to resolve ambiguities in arbitration awards shortly after they are issued, there should be no authority for them to do so long after those awards have been judicially confirmed.

A. The Seventh Circuit Erred By "Clarifying" An Arbitration Award Without An Evidentiary Record Eight Years After It Was Issued, Five Years After It Was Judicially Confirmed And Two Years After It Was Judicially Enforced.

By taking into its own hands the decision regarding what certain key terms in the award actually meant, the Seventh Circuit invested itself with a power that it should not have. Once the award had been confirmed and Banco had exhausted its appellate rights, it was simply too late for any interpretation of purported ambiguities in the arbitration award. The confirmed award represented a final judgment that should not have been subject to collateral attack by Banco.

After deciding that it was too late for Banco to either ask the arbitrators directly to clarify the award or to ask the court to remand the award to the arbitrators for clarification, the court of appeals nonetheless took up the very ambiguity that Banco wanted resolved. Thus, although it was too late for clarification from the arbitrators, it was not too late for clarification from the court.

The Seventh Circuit did not directly acknowledge that it was clarifying the award. Instead, after explaining why Banco was too late with its requests for clarification, it explained that there was a "remaining question" regarding what the letter of credit was intended to secure. 357 F.3d at 671 (App. at 7a). But that "remaining question" was precisely what Banco wanted clarified. Furthermore, the court presented both parties' competing views on the issue and recognized that there was "a legitimate disagreement." *Id.* at 670 (App. at 5a). Despite acknowledging this purported ambiguity, the court went on to resolve the parties' competing views on that issue, announcing the "correct interpretation" of the award. *Id.* at 670-671 (App. at 7a, 8a).

In effect, the court took the resolution of an allegedly ambiguous award into its own hands.

The question that the Seventh Circuit addressed and decided concerned the $9 million letter of credit. The arbitration award specifically required that reinsurers not paying their monetary share of the award within 45 days after it was issued had to post a $9 million letter of credit. Because Banco did not pay its monetary share within 45 days of the award, it was clear that it had to post a $9 million letter of credit. Every court that had looked at the award up to the time of the decision below had said exactly that.

Banco argued, however, that because it had paid its monetary share of the award (albeit years after the 45-day period had expired) it should no longer have to post the letter of credit. Rather than requiring Banco to follow the award and actually post that letter of credit and then argue about how the letter of credit might be used, the court of appeals simply relieved Banco of its obligation to post the letter of credit. Before Banco had ever posted the letter of credit, the court eliminated it as a remedy available to Wausau under the award.

That was inappropriate. The Seventh Circuit did not enforce the terms of the arbitration award -- an award whose confirmation it had earlier affirmed. Instead, it usurped the arbitrators' authority, altered the terms of the award and undermined the chosen remedy of the parties -- a decision from an arbitration panel, not a court. In essence, the Seventh Circuit rewrote the arbitration award based on its own views of what the arbitrators intended.

The Seventh Circuit's approach undermines the goal of finality served and protected by the *res judicata* doctrine. It also undermines the goal of prompt and final dispute resolution normally achieved through arbitration. This

Court's decisions directly protect and foster these goals when arbitration is chosen as a contractual remedy. By allowing opportunities for post-confirmation judicial clarification of awards, the Seventh Circuit has created an obvious incentive to shop for a new forum or decision-maker, encouraging end-runs around arbitration, and the limited judicial review afforded under the FAA and this Court's guiding case law. It also creates an incentive to delay performance, as Banco did in this case. Banco's prize for its delay here was a judicial resolution of an issue which, if timely raised under the FAA, would have been decided by the arbitrators many years ago. Banco's belated requests for clarification should have been denied outright by the Seventh Circuit.

The arbitration award became final, and beyond challenge, once confirmed by the district court, affirmed by the Seventh Circuit, and after certiorari was denied by this Court in June 2000. Nonetheless, rather than following the express terms of the confirmed award (i.e. requiring Banco to post the letter of credit), the Seventh Circuit entertained Banco's belated arguments about what the arbitrators intended the letter of credit to secure.

It is always a problem for a court to be interpreting and clarifying an award instead of an arbitration panel. It was even more of a problem here because the Seventh Circuit conducted its interpretation without the benefit of the arbitration record. The Seventh Circuit reached its decision based solely on the arbitration award itself. The court did not know what arguments the parties had made to, or what relief they had requested from, the arbitrators. That evidence is critical to any determination of what the arbitrators intended when they granted relief to Wausau and ordered the posting of a letter of credit "to secure payment of the ultimate liability in this matter." (App. at 84a).

Yet Wausau had never presented any evidence from the arbitration record because it never understood that issue to be before the district court. When Wausau, on petition for rehearing, asked for permission to present that evidence, the Seventh Circuit denied its request. If the court had allowed Wausau to do so, Wausau would have introduced ample evidence to demonstrate the purpose of the letter of credit.[7] Then, at least the Seventh Circuit would have been in a better position to follow its rule allowing it to resolve alleged ambiguities through review of the arbitration record.

B. By Dispensing With The Arbitration Award's Letter Of Credit Obligation, The Seventh Circuit Overlooked The *Res Judicata* Effect Of Banco's Previous Challenge To That Same Obligation.

In late June 2001, Banco commenced a new and separate action for declaratory relief before the U.S. District Court for the Southern District of New York.[8] In its complaint for declaratory relief in that action, Banco alleged, among other things, that the district court's January 1999 judgment "confirmed an arbitration award which is

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[7] Had the court of appeals considered evidence from the arbitration record, it would have been apparent that the letter of credit requested by Wausau was intended to provide economic protection against additional delays in payment by the reinsurers, who had not paid any of the losses submitted to them prior to the arbitration. In short, the letter of credit was a vehicle to shift the economic leverage from the reinsurers to Wausau, and to give Wausau security for future losses that would arise under the treaties and for which the reinsurers, like Banco, would bear responsibility.

[8] That action was later transferred to the Western District of Wisconsin, which granted Wausau's summary judgment motion and dismissed the case. The court determined that the suit was frivolous and sanctioned Banco.

ambiguous. . . ."; Banco sought a "construction of the judgment/arbitration award" and asked for a declaratory judgment construing "the district court judgment and the arbitration award and fixing the amount of Banco's liability thereunder to defendant Wausau." (App. at 85a-94a, ¶¶ 8, 10; App. at 25a-34a).

In the New York action, Banco made the same argument it later made before the Seventh Circuit in this appeal. It contended that once it paid the monetary amounts set forth in the arbitration award, it was no longer required to post the $9 million dollar letter of credit. The district court, in deference to the arbitration award, rejected that argument, refusing to relieve Banco of its obligation to post the $9 million dollar letter of credit. (App. at 25a-34a). A judgment was entered and Banco never appealed.

The doctrine of *res judicata* limits a party's right to raise the same argument more than once. *See Montana v. United States,* 440 U.S. 147, 153-154 (1979). The three requirements for *res judicata* are: (1) an identity of the parties or their privies; (2) an identity of the causes of action; and (3) a final judgment on the merits. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 327 n.5 (1979). Wausau argued before the Seventh Circuit that the *res judicata* doctrine barred Banco from contesting the issue of whether it must post the letter of credit. Nonetheless, the Seventh Circuit still addressed that issue and absolved Banco from doing exactly what the district court's judgment in the New York action refused to absolve Banco from doing -- posting a $9 million letter of credit.

Banco had its opportunity to argue for clarification of the award and the judgment confirming it. It did so and lost. It never appealed from the district court's judgment in the New York action. When it was permitted to relitigate these same issues again before the Seventh Circuit, the promise of

arbitration, as well as the remedy afforded through that promise, was broken. The Seventh Circuit's decision disserves the arbitration process and the judicial system and will encourage others who have agreed to arbitration to pursue round after round of litigation in the hope of avoiding unfavorable arbitration decisions.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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